Postal Regulatory Commission
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BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

Amendments to Rules of Practice	)	Docket No. RM2019-13

COMMENTS OF THE ASSOCIATION FOR POSTAL COMMERCE AND MPA – THE ASSOCIATION OF MAGAZINE MEDIA

(November 1, 2019)

Pursuant to Order No. 5229, the Association for Postal Commerce ("PostCom") and MPA – The Association of Magazine Media ("MPA") (collectively, "PostCom/MPA") submit these comments on the Commission's Notice of Proposed Rulemaking to Amend the Commission's Rules of Practice and Procedure and to Reorganize its Regulations in the Code of Federal Regulations. In general, PostCom/MPA support the Commission's effort to reorganize and amend its rules to reflect modern practice before the Commission, and PostCom/MPA urge the Commission to continue to refine its rules over time to remove administrative barriers to effective participation in Commission proceedings that can limit the Commission's ability to gather information and reach fully informed decisions. The comments below address areas where the proposed amendments could be refined to better achieve these goals.

I. THE COMMISSION SHOULD REVISE ITS EX PARTE RULES

Many of the changes the Commission has proposed are designed to reflect the predominance of notice and comment proceedings, as opposed to formal hearings on the record, in light of the changes made by the PAEA. *See* Order No. 5229 at 2. Yet, in a missed

opportunity, the Commission has not proposed any substantive changes to its ex parte rules, which are plainly predicated on a regime of formal hearings.

When the Commission revised its ex parte rules in Docket No. RM2016-4, PostCom (in joint comments with other associations) and MPA urged the Commission to loosen its proposed ex parte restrictions.[1] As the commenters explained, the Commission's ex parte rules fail to recognize the distinction between formal adjudications and rulemakings and informal notice and comment proceedings. While ex parte communications should be strictly regulated in the case of the former to ensure parties to the proceeding are afforded due process, these same concerns do not apply with respect to notice and comment proceedings. *See, e.g., Sierra Club v. Costle*, 657 F.2d 298, 400 (D.C. Cir. 1981) (explaining that "where agency action involves informal rulemaking of a policymaking sort, the concept of ex parte contacts is of more questionable utility" than in quasi-judicial proceedings). Communication between the Commission and the public with respect to ongoing rulemakings can serve to clarify issues and lead to better decisions.

For this reason, the Administrative Conference of the United States recommends that agencies place no restrictions on ex parte communications before a Notice of Proposed Rulemaking is issued. *See* Recommendation No. 2014-4 (79 Fed. Reg. 35,988, 35,995 (June 25, 2014)). Once an NPRM has been issued, a "permit but disclose" approach is preferred. *Id; see also* RM2016-4 Joint Comments at 7; RM2016-4 MPA Comments at 4. The Commission's existing ex parte rules, with their total prohibition on ex parte communications regardless of the

[1] *See* Docket No. RM2016-4, Joint Comments of the Association of Mail Electronic Enhancement; the American Catalog Mailers Association, Inc.; the Association for Postal Commerce; the Direct Marketing Association; Envelope Manufacturers Association; Epicomm; IDEALLIANCE; the Major Mailers Association; National Postal Policy Council; Newspaper Association of America; Parcel Shippers Association; Saturation Mailers Coalition; the American Forest & Paper Association; and the National Association of Presort Mailers (Feb. 29, 2016) ("RM2016-4 Joint Comments"); *see also* Docket No. RM2016-4, Comments of MPA – The Association of Magazine Media (Feb. 29, 2016) ("RM2016-4 MPA Comments").

nature of the proceeding and beginning when "the person responsible for the communication has knowledge that a request to initiate a proceeding is expected to be filed," 39 C.F.R. § 3008.3(b), are out of step with these recommendations and the practices of other agencies. *See* RM2016-4 Joint Comments at 6-8; RM2016-4 MPA Comments at 4 (noting FCC's use of "permit but disclose" approach to ex parte communications).

While the Commission claimed in Order No. 3379 that it was effectively adopting the "permit but disclose" approach to ex parte communications in most dockets, Order No. 3379 at 18, this approach can only be discerned in the rules by negative implication. Rule 3008.5 plainly states that "[e]x-parte communications . . . is [sic] prohibited," and Rule 3008.6 states that "decision-making personnel . . . shall decline to listen" to ex parte communications relevant to the subject matter of an ongoing proceeding. It is only because Commission personnel must disclose unsolicited ex parte communications pursuant to Rule 3008.6(b) and the penalties specified in Rule 3008.7 do not apply to most informal notice and comment proceedings that the Commission can claim it has adopted the "permit but disclose approach" in practice. Rather than require participants to reason their way through the consequences of non-compliance, the Commission should amend its rules to expressly adopt the "permit but disclose" approach for notice and comment proceedings.

As the Commission works to revise its rules to reflect the prevalence of notice and comment proceedings, it should revisit its ex parte rules and expressly adopt the "permit and disclose" approach employed throughout the federal government to govern ex parte communications in such proceedings. This approach will protect the interests of participants in ensuring the Commission makes reasoned decisions on the record while providing a greater

opportunity for the Commission to clarify the issues before it and receive information that could prove helpful to its decision-making.

II. THE COMMISSION SHOULD LIMIT THE APPLICABILITY OF SOME RULES

In its effort to consolidate rules that apply across all proceedings regardless of type, the Commission has proposed some amendments that appear to apply rules in inappropriate contexts. For instance, proposed Rule § 3010.144 extends the limitations placed on the participation of investigative or prosecuting officers to all proceedings, rather than only hearings on the record. It is unclear what role such officers would play in notice and comment proceedings and, in any event, why their participation should be limited. The Commission should clarify the reasoning behind the expansion of this limitation.

Conversely, the Commission's proposed Rule § 3010.164 regarding motions to strike remains generally applicable to all proceedings despite the Commission's recognition when denying a Postal Service motion to strike "nonresponsive" comments that its "practice has been to conclude that such comments are outside the scope of the proceeding." Order No. 4871 at 5. Rather than strike comments from the record, the Commission "will evaluate the comments and decline to consider such statements if the Commission finds them non-relevant and/or outside the scope of the proceeding." *Id.* This approach is appropriate for notice and comment proceedings; motions to strike are more properly presented when the Commission conducts a hearing on the record. The Commission should consider limiting proposed Rule § 3010.164 to on-the-record proceedings.

III. THE COMMISSION SHOULD CLARIFY ITS PROPOSED RULE REGARDING PETITIONS TO INITIATE A PROCEEDING

Proposed Rule § 3010.201(b)(1) would permit any person to file a petition to initiate a proceeding. Although the Commission explains that the proposed rule "provides for three

possible responses by the Commission"—to "initiate a proceeding . . . reject the petition, or defer a decision on whether to grant or reject the petition," Order No. 5229 at 43, the text of the proposed rule is unclear as to the level of discretion the Commission maintains to accept or reject a petition, the criteria it will apply, and the effect of a deferral.

First, the proposed rule states that the Commission may "in its discretion initiate a proceeding" in response to a petition. The use of the phrase "in its discretion," with no criteria given as to how that discretion will be exercised, suggests that the decision to grant a petition would be one "committed to agency discretion by law" and unreviewable under the APA. *See, e.g., Heckler v. Chaney*, 470 U.S. 821, 831 (1985); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971); 5 U.S.C. § 701(a)(2). By contrast, the proposed rule states that the "Commission may reject petitions that are frivolous or duplicative of other Commission efforts." This language appears to cabin the Commission's discretion, indicating that it can *only* reject frivolous or duplicative petitions. The rule therefore creates a serious ambiguity—if a petition is not frivolous or duplicative, it would seem the Commission has no authority to reject it. While that would imply the Commission must accept the petition, the decision to grant a petition is committed to the agency's discretion. Both standards cannot apply. Either there are criteria governing the acceptance of a petition, or the Commission intends to exercise more discretion in denying petitions. The proposed rule should be revised to clarify the Commission's intent.

The proposed rule also allows the Commission to defer consideration of "an otherwise meritorious" petition that has "not demonstrated the potential for an immediate impact on the affected person." It is unclear what constitutes "an otherwise meritorious" petition—is this a petition that is not frivolous or duplicative, or any petition that the Commission would accept "in

its discretion"? Furthermore, it is not clear what procedural posture results from a deferred petition. Is the decision to defer a petition a final, appealable order? Is there a period of time after which a deferred petition should be deemed denied? The final rule should resolve these questions to provide petitioners clarity regarding their rights to petition the Commission and the availability of judicial review.

Respectfully submitted,

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